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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

CAESARS ENTERTAINMENT CORPORATION d/b/a RIO ALL-SUITES HOTEL AND CASINO, Respondent, and INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 15, LOCAL 159, AFL-CIO, Charging Party.	No. 28-CA-060841 **CHARGING PARTY'S RESPONSIVE BRIEF**

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I. INTRODUCTION

Charging Party argued in its brief that this is not an appropriate case in which to reconsider *Purple Communications, Inc.*, 361 NLRB 1050 (2014).[1] No amicus and certainly not Rio has any response to the procedural problems facing the Board, including the need to recuse member Emanuel. Nor have they even attempted to address the other problems with the Computer Usage policy, including the confidentiality rule. It appears none of them has read the record.

The Brief of Rio, as well as the various Amici briefs submitted by employer groups, prove the correctness of the Union's position on the merits. They establish that "business information" includes information about working conditions and employers can only function if there are consistent communications about workplace issues.

Rio permits computer access and email access primarily to management and supervisors. As a result, the concerns that were raised in the Amicus briefs don't exist because Rio has allowed managers and supervisors to use the email without concerns over union organizing. Rio also allows some hourly employees in various classifications access to the email system but applies the same rules and standards it does the management personnel who have such access.[2]

When this matter was heard on December 15, 2015, in response to the Board's remand, Rio offered no evidence to support any reason why use of the email system should be limited because its theory was that virtually no statutory employees had access to email and other computer resources.[3] It would have been inconsistent with its position to allow managers presumptive access and yet claim that there were strictly applied rules to communication about

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[1] We continue the same citation and record references as in our Opening Brief.

[2] Over half of the employees are unionized and represented by three unions. The record does not establish whether or not any of those unionized employees have access to email. Many of them wear union buttons on the property. (Tr. 1, 39.)

[3] The intranet was available to all employees, and Rio did not assert that employees could not use it for concerted activity such as researching issues to support grievances. There is no principled difference between allowing use of email or the internet as compared to the intranet for Section 7 activity.

working conditions or to labor unions. Protected concerted activity was of no concern to Rio, and the record undermines the rationales now advanced by various employer Amici.[4]

II. ARGUMENTS OF THE BRIEFS OF RESPONDENT AND AMICI IN SUPPORT OF EMPLOYER CONTROL

A. NO BRIEF PROVIDES ANY EXAMPLE WHERE SECTION 7 PROTECTED ACTIVITY ON EMAIL OR USING OTHER COMPUTER RESOURCES HAS CAUSED ANY HARM TO EMPLOYER INTERESTS

Notwithstanding the fact that the Board invited Amici to submit examples helpful to its decision making, no Amici or party has submitted any examples.[5]

If no employer, almost four years after the initial application of *Purple*, can cite one example where there has been the kind of abuse about which employers are now loudly complaining, it is apparently a non-issue. Certainly Rio presented no evidence in 2015, and has not offered to present any evidence now, of such incidents.

B. THE EMPLOYER BRIEFS IGNORE THE UNDISPUTED RIGHT OF EMPLOYERS TO LIMIT THOSE EMPLOYEES WHO MAY USE COMPUTER RESOURCES, INCLUDING EMAIL

Nothing in *Purple* requires any employer to provide email access to any employee. The Amici briefs gloss over the fact that employers, like Rio, have complete control over who has access and they can further define the use by those employees who have been granted access. Rio illustrates exactly this issue. Rio claims that there are only two non-supervisory and non-management classifications of employees who have access to email. Rio Br. at 1. Although the

[4] We refer to the following briefs: American Hospital Association and Federation of American Hospitals ("AHR/FHR"); HR Policy Association, etc. ("HRPA"); Nevada Resort Association ("NRA"); and United States Postal Service ("USPS").

[5] The Amicus Brief of Montgomery Blair Sibley relates an incident where he sent an email blast to every associate working for the company, approximately 7,500 emails. It isn't clear whether he sent that email from a non-work location, but he used the corporate email system. The Board does not have before it the issue of whether an employee can send an email from outside using the email addresses of the workers, which is often readily ascertainable. In any case, that is not a risk at Rio since, according to Rio, very few employees other than management and supervisors have email addresses. And the 2007 Handbook requires that "company-wide and mass audience communications, including emails, [are to be] reviewed and coordinated through corporate communications." 2007 Handbook at p. 2.16. If done by a non-employee using corporate emails, this also would appear not to be unlawful. See *Intel Corp. v. Hamidi*, 30 Cal.4th 1342 (2003).

record reflects that there are additional classifications, nonetheless, it appears to be a limited group of employees who have such access. Moreover, once access is granted to any group of employees, employers have substantial freedom to adopt rules as to the purposes for which email is used. For example, an employer might legitimately limit the use of email to only contacting customers or prohibit use of email for any external communications. Or, the employers could limit use of computer resources to work time and require employees to log off in non-work time in a call center to avoid overtime issues. Or, the employer could forbid the transmittal of personal health information unless encrypted.

C. IN LIGHT OF *BOEING*, EMPLOYERS CAN IMPLEMENT AND ENFORCE RULES THAT PREVENT THE KINDS OF ABUSES EMPLOYERS HAVE PREDICTED

The Amici complain hysterically about the risks of cyber security, business interruption, tort liability, harassment and other fanciful possibilities. They provided not a single example of such problems tied to *Purple* or any protected communication. *Boeing*, at least in the view of the majority, solves the harassment problem since employers may enforce a "civil" workplace, including rules barring harassing, bullying, vicious or defamatory statements. *The Boeing Company*, 365 NLRB No. 154 (2017), slip op. at 12-13.[6] Moreover, they fail to explain why allowing management and supervisors and others access doesn't create the same risk, if not a greater risk, of, for example, theft of intellectual property or proprietary information or sexual harassment of employees they supervise.

D. THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT ANY LIMITATION ON PROTECTED SECTION 7 ACTIVITY BECAUSE RIO'S POLICIES APPLY PRIMARILY TO MANAGERS AND NO LIMITATIONS WERE CONTEMPLATED FOR STATUTORY EMPLOYEES

Rio made no effort to demonstrate that there were any concerns about any of these risks that were not covered by the four pages of computer use policies. The reason is obvious. Rio's access to computer systems is primarily for management, and such access is carefully controlled

[6] The NRA illustrates this by claiming *Purple* allows language that is abusive and racist. See NRA Br. at 7-9. *Boeing* establishes that an employer can have rules prohibiting such inflammatory speech.

and requires management approval by completing an internet access form, "IAF," available in *Insite*, I.T. Forms. 2007 Handbook at p. 2.13. However, Senior Management and others "are automatically granted internet access by I.T." *Id.*

Rio introduced no evidence on the need to do anything further because it was satisfied that its procedures, as they existed at the time of the 2007 Handbook, were sufficient to prevent computer abuse. See, generally, restrictions and protections in the Computer Usage policy, 2007 Handbook at pp. 2.13-2.16.[7] Moreover, Rio did not want to impose any more restrictions on managers who automatically had access. That isn't to say that now, 11 years later, the risks and protections are not different, but there is no record to support any Board decision on non-existent facts.

Rio did raise a concern with regard to customer privacy. That is also covered in the Computer Usage policy. See 2007 Handbook at p. 2.14 (referring to "electronic information security policy") and p. 2.21 (referring to "Guest privacy"). Rio also argued that, in a regulated environment, there are additional risks, but none is tied to protected concerted activity.[8]

E. ALL AMICI AGREE THERE ARE MANY NEW AND RAPIDLY DEVELOPING FORMS OF ELECTRONIC COMMUNICATIONS; PLATFORMS ARE USED BY MANY EMPLOYERS TO FACILITATE COMMUNICATION, INCLUDING COMMUNICATION ABOUT WORKING CONDITIONS

All parties and Amici agree that there are now many forms of electronic communication systems available to employers and employees. All Amici agree that *Purple* applies in some respects to these forms of communication. These current and rapidly changing forms of electronic communications include various available platforms that were never considered. This was, in part, because, on remand, the issue was a 2007 handbook, and the platform used at the time had also been abandoned in 2007, eight years before the 2015 hearing. There are many

[7] It should not be ignored that the same Computer Usage policy applied to all Caesars Entertainment properties.

[8] The best the NRA can do is note that the Nevada Gaming Commission is considering rulemaking regarding sexual harassment.

websites that advertise such programs and platforms. See, e.g., *Slack*, https://slack.com/.[9] None of these websites indicate any concern as expressed by the Amici. They all flaunt that worksite communication can be made far more effective with effective safeguards.

F. THE EMPLOYERS IGNORE THE RECORD EVIDENCE THAT EMPLOYEES DO COMMUNICATE ABOUT WORKING CONDITIONS AND RIO PERMITS IT

All the Amici, except the American Federation of Labor and Congress of Industrial Associations, have ignored a very important aspect to the record. Rio's only witness in the first hearing, Dean Allen, who was Vice-President of Labor Relations, admitted that he knows that employees regularly use the email to communicate on a broad range of issues. (See Tr. 1, 52 and 54-55 (they email to discuss "wages, his benefits, hours and working conditions")).[10]

The Amici briefs of the employers add nothing to this case because they ignore the circumstances governing the Rio. The Rio is largely a unionized employer, which apparently doesn't show any concern for discussion about wages, hours and working conditions by employees. It, moreover, limits access to computer resources, and, in particular, email, to a relatively small group of employees. It grants access to management supervisors and imposes no constraints over concerns about either abuse of email or use for improper purposes, including organizing. It thus offered no evidence on the record that would sustain any decision by the Board that would modify *Purple*.

G. NONE OF THE ISSUES RAISED BY THE BRIEFS UNDERMINE THE CHARGING PARTY'S ARGUMENTS THAT UNDER *BOEING*, "BUSINESS INFORMATION" INCLUDES INFORMATION ABOUT WORKING CONDITIONS

We argued in our Opening Brief that business information includes information about working conditions. Some of the Amici concede that information about working conditions is business information. None argue that it isn't.

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[9] It has been reported that Slack is issuing an IPO valued at four billion dollars.

[10] He doesn't explain which employees. Assuming these are a mix of management and some statutory employees, it proves our point that the rules allow it.

No one disputes that the managers and supervisors have access to the email and use it to transmit information about working conditions. Indeed, the very fact that payroll information is transmitted by email proves our point. Additionally, the employees who were in the human resource department use email systems to transfer information to others about working conditions.

No party disputes that, under *Boeing*, employers and employees would interpret "business information" to include information about working conditions. Thus, construed that way, employees who have access to email have a right to communicate about working conditions.

H. BECAUSE THE PHRASE "BUSINESS INFORMATION" FOLLOWED A REFERNCE TO CHAIN LETTERS, RIO MEANT TO PROHIBIT CHAIN LETTTERS, WHICH ARE NOT BUSINESS INFORMATION

None of the briefs address the alternative argument we have made, that the prohibition on email usage refers to "non-business information" contained a reference to chain letters or similar system wide transmissions. This was made particularly clear in the 2015 Handbook.

I. NO BRIEF HAS ADDRESSED THE SPECIFIC RECOGNITION THAT EMPLOYEES WHO HAVE ACCESS TO EMAIL, USE IT FOR "PERSONAL EMAIL"[11]

To be clear, the rule states, in italics added by the Board: "*Limit the use of personal email, including using streaming video (e.g. video and audio clips) and downloading photos.*"

This is an explicit recognition that those who have access use it for personal purposes.[12] The reference to "personal email" may be both referring to using the company's email for personal purposes as well as accessing, through the Remedy platform, the employee's own personal email. In any case, the only concern expressed by that rule is limiting the downloading of certain large content files. Of course, nothing in the rule exempts other provisions, such as prohibiting access of pornographic sites or otherwise inappropriate emails.

[11] As noted in our pending Motion to Strike Brief of Respondent and Further Sanctions, Rio's counsel deliberately deleted the italicized language allowing the use of personal email.

[12] In *Register Guard*, employees were allowed routine use of email for indisputably personal purposes. The examples showed no relationship to working conditions. 351 NLRB 1110, 1119 (2007).

This language refutes any suggestion that Rio did not anticipate that all employees who have access to email would use it for personal purposes. See HRPA Br. at 4, fn.1 (conceding use of "email systems for non-essential communication," meaning, of course, personal communication).

To be clear, we submit that communications about working conditions are not "personal." Certainly, when management and Human Relations communicate to employees orally, in writing or electronically, it is not personal. When employees communicate among themselves about the same issues, it is not personal. So when they communicate with employees of other Caesars Entertainment properties, it is not personal. And when management communicates with any outside organization, it is not personal, just like when workers communicate with a union about a workplace grievance. And, certainly, Rio could not have intended communications about workplace issues to be personal since management and Human Relations personnel do it regularly.

J. PROHIBITIONS AGAINST USING COMPUTER RESOURCES FOR "NON-BUSINESS PURPOSES" OR "NON-WORK-RELATED" PURPOSES ARE NOT ANY MORE CLEAR THAN "NON-BUSINESS INFORMATION" RESTRICTIONS

The employer briefs attempt to convert the prohibition to a broader one of prohibiting any non-business purpose or non-work related purpose. First, that isn't Rio's rule. Thus, the record is to the contrary.[13] There is a separate reference at page 2.16 of the 2007 Handbook, which refers to a computer usage policy located on Harrah's Insite System, which was abandoned. It suggests, again, contradictorily, "that any use of Harrah's computer equipment is to be for business purposes only…." See 2007 Handbook at p. 2.16.[14] The Rio has not relied on this language and certainly recognizes that the language is never enforced, because managers and

[13] Rio refers to the provision in the 2007 handbook, the precursor to the 2015 Computer Usage rule, which states: "Computer resources are Company property and are provided to authorized users for business purposes." It doesn't say that it is provided "only for business purposes." And, as we point out, the language in the rule that is before the Board makes it clear that the employer understands and allows employees use of "personal email …."

[14] The company allows unrestricted access to certain "globally approved sites." 2007 Handbook at p. 2.13.

others who have access use it for purely personal purposes. The Board should draw an adverse inference from Rio's failure to prove that they enforce the language; employees use computer resources for personal purposes, as revealed by audits that Harrah's, like every other employer, performs about computer usage. Rio recognizes that employees who have access to internet and intranet do, on occasion or sometimes more often, use email and intranet and computer resources for personal purposes. No Amici's brief argues that employers who have such rules strictly and consistently enforce them against all uses of electronic communications.[15]

We see little difference between limiting computer use to transmission of "business information" and a prohibition against using computer resources for non-business purposes or non-work related purposes. But it probably makes no difference because management and supervisors communicate about working conditions for work related purposes. Managers and supervisors communicate about working condition issues for business purposes. Managers communicate with the unions. Workers communicate among themselves and sometimes with their unions for work related purposes. Surely, this rule does not discriminate and say that only managers and supervisors and non-employees can communicate about working conditions while employees cannot do the same once they have been granted access. That, to say the least, would be a strange application of an email access policy. It would put management in the difficult position of being able to communicate with workers about working condition issues and the workers not being able to communicate in return. But, if management wants a one directional communication system, that would not be unlawful.[16]

The Board has only Rio's rule, which is limited to "non-business information." It cannot change the issue to "business" or "work related" purposes.

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[15] The same is true of phones. That is not to say that an employer could not strictly enforce such a rule, or apply the rule to some employees and not others. Most employers would not do so, since it would create employee resentment. But that case, like *Purple*, is not before the Board.

[16] Rio has buzz sessions where management informs employees about various matters and it presumably would affect working conditions. Management could allow no employee to respond. But if it allows employees to ask questions, employees can ask about working conditions.

K. THE AMICI AND EMPLOYER READILY ADMIT THAT WHAT THEY ARE TRYING TO PREVENT ARE CRITICAL EMAILS, BUT THEY ARE MORE AFRAID OF EMAILS THAT ARE CRITICAL ON WORKING CONDITION ISSUES

Let's be clear. The Amicus briefs are filled with references that they don't want their systems used for communications that are critical of their working conditions. What they are even more fearful of is that employees will communicate about working conditions as a preliminary step to union organizing or to support concerted activity. We note that while there is a considerable difference between workers communicating to make changes in the workplace without Union involvement as opposed to doing so with the involvement of a Union, both are protected. The dividing line between communication that is protected activity for mutual aid or protection and communication that is not concerted or not for mutual aid or protection is not always clear. None of the Amici suggest that an employer would prevent employees from being critical of employer policies in an effort to improve them until they sense organizational activity.

An example of this hysteria is a statement in Rio's brief:

> It is one thing to require an environment for free-flowing communication about the terms and conditions of employment, but quite another to create an employer-subsidized, employer-critical speech zone.

See Rio Br. at 7.

Rio's policies state the opposite, undercutting counsel's argument:

> We actively seek and respond to employee opinions on all aspects of their jobs, from the quality of their supervisors to the quality of our casinos.

2007 Handbook at p. 1.2. See also *id*. at p. 5.6 ("Talk to the Top").

Contrary to the alarmist tone of the Amici, most employers welcome criticism as a means of self-improvement. There are many business communication models that virtually require employees to be self-critical, and certainly management has to be self-critical in order for an organization to effectively function.[17]

[17] Ultimately, an employer could implement a rule that email may be used to communicate only positive comments, and then employees would be disciplined for any negative or critical comments. That would be lawful unless it involved working conditions and was concerted.

We would think most employers would welcome employee criticism as a means of improvement in communication about ideas.[18] Section 7 protects such employer critical speech when it is a form of concerted activity "for mutual aid or protection." Employers are thus conflicted. On the one hand, they want criticism, and on the other hand, they want to ban it. That tension is resolved by Section 7, when it protects concerted communications "for mutual aid or protection" so long as employers allow communication.[19]

In summary, the Amici make it clear that the real complaint of employers is employees communicating together, without the involvement of management, about working conditions. This is the core problem from the employer's point of view, but it is protected by the National Labor Relations Act.[20] The HRPA Brief is correct that these issues often "spark passionate sometimes intensive (or inappropriate) responses." HRPA Br., at p. 6. Nonetheless, employers invite and use computer systems to discuss and resolve "workplace leave issues, scheduling, discipline and many other subjects." *Id.* This reference in the brief proves our point.

L. THE PHRASE "NON-BUSINESS INFORMATION" REFERS TO INFORMATION CONTAINED IN A CHAIN LETTER

Neither Rio nor the Amicus briefs deal with the particular contextual content of the prohibition about sending "non-business information." As we pointed out in our opening brief, this comes within the context of the reference to "chain letters" and is clarified to be specifically applicable to such chain letters or other mass communications across systems in the 2015

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[18] The old suggestion box is a crude example.

[19] Ironically, no Amici seem to complain about employees' complaints about other issues. Indeed, employers often invite employees to complain about harassment policies. Mandatory arbitration procedures are a way to channel employee complaints about working conditions and invite such complaints to avoid litigation.

[20] The HRPA Brief, at page 6, concedes this point when it states:

> Further, the Board's *Purple Communications* standard invites business email systems to become an open form for topics well beyond union organizing and bargaining, including immigration, workplace leave issues, scheduling, discipline, and many other subjects that touch upon terms and conditions of employment.

Handbook. Rio's concern is for the specific problem of chain letters, not the different problem of communications among multiple employees about workplace issues.[21]

M. RIO'S POLICY DOES NOT PROHIBIT COMMUNICATIONS TO OUTSIDE PERSONS OR OUTSIDE ORGANIZATIONS

Because the email system is used by management, there is no prohibition on communications to outside persons.[22] There is no limitation in the Rio rules about contacting outside persons including labor organizations. Indeed, the Computer Usage policy contemplates such contact. The VIP agents have access to the internet for purposes of servicing their guests, which includes contact through the internet and email. Presumably, various managers communicate with the union representatives and do so by using email. Human Resources persons might communicate with Equifax and the Nevada Gaming Authority.

What Rio does limit is "[s]har[ing] confidential information with the general public…." See 2007 Handbook at p. 2.14. As was established in our opening brief, the reference to confidential information is overbroad because it refers to the definition of "[c]onfidentiality" at page 2.21, which the Board found to be overbroad because it includes, for example, "[o]rganizational charts, salary structures, policies and procedure manuals…." See 2007 Handbook at p. 2.21.

Rio, like many employers, is content to allow employees to have access to email and/or or internet to contact third persons so long as they do not violate other restrictions.[23] In summary, there is no *Register Guard* issue. Since the Rio doesn't prohibit contact with outside organizations for what it perceives to be a business purpose, the Board has no basis to overrule that business choice.

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[21] This is confirmed by the additional reference in the handbook that corporate-wide communications are handled by the corporate communications department. See 2007 Handbook at p. 2.16 (referring to "Company-wide and mass audience communications, including emails…").

[22] See *Citizens United v. FEC*, 558 U.S. 310 (2010).

[23] For example, an additional limitation is that users cannot "[c]onvey or display anything fraudulent, pornographic, abusive, profane, offensive, libelous or slanderous." 2007 Handbook at p. 2.14. This is now valid under *Boeing*, and it illustrates the only limits placed on the use of email.

Vice-President for Labor Relations, Dean Allen, conceded that he knows employees communicate about working conditions all the time (Tr. 1, 54-55), which reflects the fact that the Rio is a largely unionized workplace. This employer doesn't have the hysterical attitude about organizing in workplace communications that other employers have. This prevents the Board from using this record to establish *Register Guard* prohibitions in other workplaces.

Our position is solidified by the other references in the handbook to the use of email or internet to contact third parties.

N. THE ISSUE OF USE FOR SOLICITATION IS NOT PRESENT IN THIS CASE

The 2007 Handbook prohibits use of computer resources to "[s]olicit for personal gain or advancement of personal views…." Because the handbook was oriented towards management, we submit that "personal views" has nothing to do with Union organizing or protected concerted communications about working conditions. There is no allegation that this is unlawful, and the ALJ made no finding as to the legality or lawfulness of this restriction. As noted in our opening brief, the rule was clarified in the 2015 Handbook. This explains again why Rio offered no evidence in support of any business justification for any limitation in the 2007 Handbook.[24] This language is not the typical non-discriminatory language that would prohibit "all solicitation." See 2007 Handbook at p. 2.19. It is limited to personal gain.[25] Under *Boeing*, it would not be understood to include concerted activity about working conditions. Under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), some employees would construe it to include Section 7 activity, and it would be overbroad.

The rule does not limit anyone other than the employee doing the soliciting. Although Rio may have contemplated that that applies to both employees who are doing the soliciting as

[24] This narrow reading is confirmed by example 19 of the company's rules, which states: "employees will not solicit or distribute any literature on company premises during working time." See 2007 Handbook at p. 2.19.

[25] Caesars Entertainment maintains a call center. Each of those employees, like many employees in the hospitality industry, solicits customers to patronize the properties. Workers solicit help and assistance. It would be far too broad if this rule were interpreted to prohibit all such solicitation using computer resources with patrons.

well as to employees who are being solicited, it is much harder to enforce since the employees being solicited can't always know the contents of the conversation or communication.

We agree that employers can prohibit true solicitation during work time. But it has to be applied non-discriminatorily, and that issue is not presented in this case.

In summary, although the Board can, in another case, find that a carefully drafted no solicitation rule that applies only during non-work time may be enforced, that issue is not before the Board.[26]

O. THE PARADE OF HORRIBLES SUGGESTED BY AMICI ILLUSTRATE OUR POINT

The brief of AHA/FAH particularly illustrates our point. As they properly point out, there are very substantial medical privacy issues in any health care institution. Yet they have offered no example where an employer has allowed access to email to certain employees who then used it for protected concerted activity where protected health information has been compromised. The brief emphasizes the need to use electronic records, including electronic health records ("EHRs"), and electronic communications systems in the health care context.

The brief emphasizes the efficient delivery of patient care. That necessarily includes issues of working conditions. Plainly, scheduling, patient load, training, recruitment and staffing are important issues discussed by health care workers all the time. Each relates to working conditions, and such discussions can well develop into efforts to change working conditions that improve patient care. Imagine professional and non-professional employees around a nursing station discussing how to improve patient care through scheduling and other changes. No healthcare institution would interfere with such discussions. Yet the thrust of this brief is to prevent such discussion when it occurs on an electronic system rather than in place on site at a nursing station in a hallway or even sometimes in a patient's room.

[26] The no distribution rule does not apply to electronic communications. It applies to "literature." See 2007 Handbook at p. 2.19. The reference to the use of personal email and limiting certain files confirms that other attachments are permissible.

There is no logical or practical justification for such a distinction. Indeed, if the healthcare institutions are so concerned about improving healthcare, they would encourage such discussion even if it involves seeking change or improvement and even if it is critical of a current practice and management.

The brief makes much of what it calls a "distraction" principle, suggesting that electronic communications may be a harmful distraction to health care providers. They offer no proof that discussions about improving patient care by improving working conditions is such a distraction. Certainly, when managers or supervisors get involved in such discussions, it is not a distraction in their terms nor is it a distraction when they communicate to employees. It is even less a distraction when workers discuss such issues.[27]

In summary, what the Amici's briefs demonstrate is that they are interested in limiting union activity, but they cannot restrict discussions about working conditions. The AHA/FAH brief amply illustrates this. The brief repeatedly advocates prohibiting Section 7 communications through email and electronic communication systems. The brief is not limited to simply prohibiting what is true solicitation. Employers would like to be able to have rules that state: "There should be no use of electronic communication systems to communicate about working conditions with other employees or employees of other employers or with any outside organization that might lead to concerted activity of any kind." That proposal is far too broad and does not align with the facts in the record in this case.

P. *PURPLE* IS TOO NARROW

All of this proves that employees communicate orally about working conditions among themselves and with management. They do this throughout the day. Increasingly, that communication is also or alternatively done electronically. Sometimes it becomes Section 7 activity because employees communicate to improve the workplace and working conditions.

[27] We understand that if an employer wants to prohibit discussions in a patient's room in front of the patient about delivery of health care, it may do so. Responding to an email about staffing in the patient room is unknown to the patient, so electronic communication avoids this problem. Rio promotes complete respect for customers and discourages discussions of such issues in front of customers. See 2007 Handbook at pp. 2.18-2.21 (general rules about contact with customers).

Purple was too narrow. Once employees are given mouths, they can talk in the workplace for mutual aid or protection. Once they are given access to email or other computer resources for work use, they can communicate during work time about the same concerns for mutual aid or protection. To the extent they can talk before and after work, they can do the same through an electronic medium. Employers can have no-talking rules and can deny access to email.

Q. THE FIRST AMENDMENT AND DUE PROCESS

The Board has never found any provision of the Act to be unconstitutional. If the Board wants to apply the arguments that many Amici have regurgitated, then it will have to do the same when it considers what speech is compelled by a union when enforcing union security or what speech is prohibited when engaging in communication involving various provisions of the Act, including boycotting and picketing. Amicus USPS will have to face what rights its federal employees gain. We leave it to the courts to weaponize the First and Fourteenth Amendments.

III. CONCLUSION

The Board should dismiss the complaint as to the reference to "business information." The Computer Usage policy is overbroad and unlawful. If, however, based upon the position advocated by the Amici and Rio, the Board finds that the words "business information" would prohibit communication about working conditions, it should find that language to be unlawful. Finally, it should overrule *Purple* to the extent it is limited to non-work time.

Dated: October 19, 2018

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
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PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction this service was made. I am over the age of eighteen years and not a party to the within action.

On October 19, 2018, I served the following documents in the manner described below:

CHARGING PARTY'S RESPONSIVE BRIEF

☑ (BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 19, 2018, at Alameda, California.

/s/ Karen Kempler
Karen Kempler